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Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 1052

WALTER LOGAN,
Petitioner,

v.

EMPRESA LINEAS MARITIMAS ARGENTINAS
ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner, Walter Logan, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

I.

Opinions Below.

The opinion of the District Court denying petitioner's motion for judgment and for a new trial is printed in the Appendix (App. 22). The opinion of the United States Court of Appeals for the First Circuit is printed in the Appendix (App. 23), and is reported in 353 F. 2d 373.

II.

Jurisdiction.

The opinion of the First Circuit was rendered on December 9, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

III.

Questions Presented.

1. Did the Circuit Court err in upholding the District Court's refusal to rule as a matter of law that the respondent Empresa Lineas Maritimas Argentinas was liable for unseaworthiness because of the undisputed facts of Logan's accident?

2. Did the Circuit Court err in upholding the District Court's refusal to give requests for instructions numbered 3 and 5 to the jury? Did the refusal to grant these requests emasculate the doctrine of seaworthiness and prevent the jury from finding that the mere falling of the hatch board would warrant them to find unseaworthiness?

3. Was Logan denied his constitutional right to a fair and impartial trial under the Fifth Amendment because of the bias and prejudice exhibited by the District Court Judge Wyzanski against Logan and his counsel?

IV.

Statement of the Case.

Petitioner (hereinafter referred to as Logan), a longshoreman, fell from the lower 'tween deck to the lower hold, a distance of about 20 feet, when a hatch board that he was walking on gave way (R. 20, 54, 55). The accident

took place on the vessel Rio Bermejo on October 31, 1963. Logan, employed by Jarka Corporation of New England, was engaged in unloading bales of wool and, with his fellow longshoreman, Carr, had just hooked into two bales of wool. Logan was walking away from the bales to get out of the way when the hatch board with Logan toppled to the lower hold. The bales of wool had not moved (R. 20, 45, 52).

The hatch board rested on beams and was of wood construction, about 20 inches wide, 103 inches long and 2 inches thick (R. 54).

Carr was about 2 or 3 feet behind Logan and was an eyewitness to the accident. He testified: "He [meaning Logan] stepped on a hatch cover and he went down" (R. 45).

Respondent Empresa Lineas Maritimas Argentinas admitted in answers to Logan's interrogatories that "Walter Logan fell, together with a hatch board, from Number Two lower 'tween deck to Number Two lower hold" (R. 54). The hatch board involved in Logan's accident and the distance of the fall appear in photographs as Plaintiff's Exhibit 2(a) and 2(h) (R. 95, 97).

V.

Reasons Relied on for Granting the Writ.

1. THE CIRCUIT COURT ERRED IN FAILING TO RULE AS A MATTER OF LAW THAT THE RESPONDENT EMPRESA LINEAS MARITIMAS ARGENTINAS WAS LIABLE FOR UNSEAWORTHINESS BECAUSE OF THE UNDISPUTED FACTS OF LOGAN'S ACCIDENT.

A judge sitting with a jury must direct a verdict on liability where the relevant evidence on the issue is clear, uncontradicted and unimpeached, so that the matter is a question of law only. *Slocum* v. *New York Life Insurance Co.*, 228 U.S. 364, 369; *United States* v. *Grannis*, 172 F. 2d 507, cert. den. 337 U.S. 918 (4 Cir. 1949).

Logan claimed he was entitled to recover (1) if the hatch board was short; (2) if the hatch board was dislodged; (3) or from the mere fact the hatch board fell (R. 91). That Logan did not restrict his right to recover to the sole claim of a short cover as indicated by the Court of Appeals (App. 24) is established by plaintiff's requests for instructions (R. 86-88). The District Court itself recognized in its charge to the jury that there was more present in the case than an exclusive claim of a short hatch cover (R. 79, 80).

The decisions of the Circuit Court and the District Court in this case conflict with two decisions of the Supreme Court. *Mahnich* v. *Southern Steamship Co.*, 321 U.S. 96, and *Alaska Steamship Co., Inc.*, v. *Petterson*, 347 U.S. 396, affirming per curiam *Petterson* v. *Alaska Steamship Co., Inc.*, 205 F. 2d 478. Additionally, the decision conflicts with the Second Circuit Court cases of *Grillea* v. *United States*, 232 F. 2d 919, and *Van Carpals* v. *The S.S. American Harvester*, 297 F. 2d 9 (1961); the Fifth Circuit case of *Vega* v. *The Malula*, 291 F. 2d 415 (1961); and the recent Ninth Circuit case of *Beeler* v. *Alaska Aggregate Corp.*, 336 F. 2d 108 (1964).

Long before the humanitarian doctrine of seaworthiness was extended to longshoremen in the case of *Seas Shipping Co., Inc.*, v. *Sieracki*, 328 U.S. 85 (1946), the Federal Courts invariably permitted a longshoreman to recover when a hatch cover gave way similarly to the tragic event that befell Logan. The Courts did not impose a burden on the longshoreman to explain his accident or establish the cause, but inferred liability from the mere happening of the accident. See *The Yoxford*, 33 F. 521, 523 (D.C. E.D. N.Y. 1887); *Frederick Leyland & Co., Ltd.*, v. *Holmes*, 153 F. 557, 559 (1907); *Hamburg-American Steam Packet Co.* v. *Baker*, 185 F. 70, 72 (4 Cir. 1911); *The Black Eagle*, 30 F. Supp. 16 (D.C. Mass. 1939).

Longshore work is extremely hazardous work. Circuit Court Judge Bell, in the case of *Burgess* v. *Farrell Lines, Inc.*, 335 F. 2d 885 (4 Cir. 1964), wrote as follows at page 891:

> "1. The House Report accompanying the 1958 Amendment to the Longshoremen's and Harbor Workers' Compensation Act points out that stevedoring is the most hazardous of all industries which report their experience to the Bureau of Labor Statistics, having an injury frequency rate of seven times that of manufacturing. (1958 U.S.Code and Cong.News, p. 3843)."

Hatch boards were provided to Logan as a working platform. All Logan did was to step on the hatch board and down he fell, along with the hatch board, a distance of 20 feet. The only conclusion possible is that the hatch board was not fit for its intended purpose and was unseaworthy. The Supreme Court in *Seas Shipping Co., Inc.*, v. *Sieracki*, 328 U.S. 85, stated the considerations that impelled this Court to extend the humanitarian doctrine of seaworthiness to longshoremen. The Court wrote at pages 94-95:

> ". . . And beyond this he [shipowner-mine] is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost.
>
> "These and other considerations arising from the hazards which maritime service places upon men who perform it, rather than any consensual basis of responsibility, have been the paramount influences dictating the shipowner's liability for unseaworthiness as well as its absolute character. It is essentially a species of liability without fault, analogous to other

> well known instances in our law. . . . It is a form of absolute duty owing to all within the range of its humanitarian policy."

Logan submits that, on the basis of the undisputed facts in his case, the foregoing decisions, and the policy considerations as enunciated by the Supreme Court in *Sieracki,* the District Court should have ruled as a matter of law that Logan was entitled to recover on the issue of liability.

2. THE CIRCUIT COURT ERRED IN UPHOLDING THE DISTRICT COURT'S REFUSAL TO GIVE REQUESTS FOR INSTRUCTIONS NUMBERED 3 AND 5 TO THE JURY. THE REFUSAL TO GRANT THESE REQUESTS EMASCULATED THE DOCTRINE OF SEAWORTHINESS AND PREVENTED THE JURY FROM FINDING THAT THE MERE FALLING OF THE HATCH BOARD WOULD WARRANT THEM TO FIND UNSEAWORTHINESS.

Logan properly submitted requests numbered 3 and 5, which read as follows:

> "3. If the jury finds the hatch board that the plaintiff stepped on dislodged and fell to the lower hold; the jury is warranted in finding the defendant liable for unseaworthiness."
>
> "5. If the jury finds the hatch board was dislocated and/or not secure before the accident and the hatch board gave way when the plaintiff stepped on it; the jury is warranted in finding the defendant liable for unseaworthiness." (R. 2, 8, 9.)

After the District Court's charge, Logan objected to the failure of the Court to give these specific requests in its charge (R. 86-88).

Logan relied principally on this claim of error in his appeal to the Circuit Court. The Circuit Court disposed of this claim in these words:

> "In reference to requested instructions Numbers 3 and 5, it is to be noted that the court in its charge did not ask the jury to make a finding of liability. They were asked to answer specific questions submitted to them. This not only was entirely proper, but the record also shows no objection by appellant to these questions. Inasmuch as instructions Numbers 3 and 5 contained the language 'the jury is warranted in finding the defendant liable . . . ,' they were inappropriate under the circumstances, and there was no error in refusing to give them to the jury." (App. 27.)

The District Court did employ special questions to the jury. The first submission of special questions consisted of the following question and the jury answers as follows:

> "To the question of 'A. Was the injury to the plaintiff Logan due to one or more of the following causes:
>
> "1. The hatch cover board was short of the proper length.
>
> "2. The hatch cover board was dislodged by being dragged out of place by the stevedoring operations.
>
> "3. The hatch cover fell for unexplained reasons.'
>
> "Your answer is Number 3, the hatch cover fell for unexplained reasons.
>
> "'B. What were the total damages suffered by the Plaintiff Logan which were attributable to the fall he suffered on October 31, 1963?' You have answered $60,000.
>
> "'C.' To that question: 'Was the plaintiff Logan contributorily negligent?', you have answered no.

"To 'D. If you answered "Yes" to "C", what proportion of the total causes of the accident is attributable to the contributory negligence of plaintiff Logan?', you have no answer." (R. 88-89.)

The District Court then submitted the further special question: "Was the hatch cover reasonably fit for its intended purpose, that is, was the ship 'seaworthy' as the Court has defined that term" (R. 91). The instructions of the District Court gave the jury no help whatsoever on the issue as to what constitutes unseaworthiness as applied to the facts of this case. It was Logan's claim that, if the jury found the hatch board was unsecure and dislodged and gave way when Logan stepped on it, the jury could find liability. The District Court refused to give this charge and actually, when Logan attempted to argue just before the second special question was submitted to the jury that the mere falling of the hatch board was sufficient for the jury to find unseaworthiness, the District Court went out of its way to emasculate this argument by interrupting the argument and stating that the jury had to find the hatch cover was not reasonably fit (R. 93).

The Circuit Court justifies the refusal to give requests 3 and 5 as proper because the District Court employed special questions and did not ask the jury to make a finding respecting liability. The Circuit Court stated that the requests contained language that "the jury is warranted in finding the defendant liable" (App. 27), and therefore, the requests were inappropriate.

Logan submits that the Circuit Court's decision is in direct conflict with two decisions of the Supreme Court, *Mahnich* v. *Southern Steamship Co.*, 321 U.S. 96, and *Alaska Steamship Co., Inc.*, v. *Petterson*, 347 U.S. 396, affirming per curiam *Petterson* v. *Alaska Steamship Co.*,

Inc., 205 F. 2d 478, and also is in conflict with the Second Circuit decisions of *Van Carpals* v. *The S.S. American Harvester*, 297 F. 2d 9 (1961), *Grillea* v. *United States*, 232 F. 2d 919, the Fifth Circuit *Vega* v. *The Malula*, 291 F. 2d 415 (1961), and the Ninth Circuit *Beeler* v. *Alaska Aggregate Corp.*, 336 F. 2d 108 (1964).

Surely, the second submission to the jury of the question, "Was the hatch cover reasonably fit for its intended purpose, that is, was the ship 'seaworthy' as the Court has defined the term," relates to the issue of liability. It was the jury's answer of "Yes" to the question that resulted in judgment being immediately entered for the shipowner (R. 94). The jury were never told that the mere falling of the hatch board entitled them to answer "No" to this crucial special question. The Circuit Court does not say the requests were not proper, but deems the requests inappropriate because the District Court employed special questions. Logan submits that the fact that special questions were used in no way eliminates the obligation of the trial Court to grant these requests.

3. LOGAN WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL UNDER THE FIFTH AMENDMENT BECAUSE OF THE BIAS AND PREJUDICE EXHIBITED BY DISTRICT COURT JUDGE WYZANSKI AGAINST LOGAN AND HIS COUNSEL.

Logan was persuaded that he did not have a fair and impartial trial. He duly filed a motion for a new trial, setting out as the first ground the bias and prejudice of the trial judge (R. 12). The District Court denied the motion (App. 22).

In his brief in the Circuit Court Logan reiterated the charge of bias and prejudice and set forth the following incidents to support his claim. All these incidents took place before the jury.

1. Logan attempted to put Dr. Paul I. O'Brien on the stand as his first witness. Before the witness testified, this colloquy took place with the Court.

"The Court. All right. You may proceed with the evidence.

"Mr. Hallisey. Judge, this may be a little premature, but I think we are going to object to this medical testimony before there is any foundation—

"The Court. Of course. You have every right to if you haven't agreed to it.

"Mr. Greenberg, call the witnesses, if there be any, on the liability before getting on to the medical liability.

"Mr. Greenberg. Well, Your Honor—

"The Court. I ruled that and I will abide by that.

"Mr. Greenberg. Well, Your Honor—

"The Court. You know what the law is and you are not going to trifle with its usual practice.

"Mr. Greenberg. Your Honor, at the pre-trial hearing I deliberately raised the issue of putting the doctor on out of turn. We have an awful time getting these doctors and I asked Mr. Hallisey and he had no objection to putting the doctor on out of turn.

"The Court. Where is that in the pretrial order?

"Mr. Greenberg. Well, that was the two points I raised. One point—

"The Court. Where is it in any pretrial order. Don't make representations that are not supported by the record. Where is it?

"Mr. Greenberg. It was raised, Your Honor, and you agreed to it.

"The Court. Where is it in the pretrial order. Where does it indicate that I agreed to it. You can't

put words in my mouth, Mr. Greenberg. I will not tolerate such representations.

"Mr. Greenberg. Well, Your Honor, the counsel knows I raised the issue and they agreed to it. All Mr. Duffey printed was what they wanted in it. Get Mr. Duffey.

"The Court. I will declare a mistrial in another minute.

"Mr. Greenberg. That's all right. I'd like to have Mr. Duffey come in. I have a note of it in my record. You know I wouldn't misrepresent. I respect the Court. You know I wouldn't misrepresent.

"The Court. I know you don't mean to be contemptuous, but you are.

"The witness is excused. Will you call your witness on the liability." (R. 15-16.)

2. During Logan's testimony these exchanges took place between Logan's counsel and the Court:

(*a*) "Mr. Greenberg. Now, you had some photographs, Mr. Hallisey, that you took at the time. Could I have them, please?

"Mr. Hallisey. I have three that I am going to produce.

"Mr. Greenberg. He has taken pictures at the time of the accident, Your Honor, I think I am entitled to them.

"The Court. Mr. Greenberg, if you were an inexperienced lawyer acting this way, I could understand it. But I am not going to allow you, with all your experience—

"Mr. Greenberg. I haven't had that much experience.

"The Court. You have not had enough chastening experience, but you may get it before long.

"Mr. Greenberg. Your Honor, I don't think that's fair to my client. It's the interest of my client that's important.

"The Court. Well then, will you please allow your client to speak, without your speaking in the presence of the jury in a critical way about brother counsel and about the Court contrary to the traditions of the Bar.

"Mr. Greenberg. Well, Your Honor, Mr. Fox of Bingham, Dana & Gould went down, the day of the accident, a couple hours after the accident, and took pictures, photographs of the hatch cover. I had a court order, and I had some men go down to the wharf and they took pictures. And by the time they took the pictures the hatches were covered. These won't be as helpful as his pictures. So I thought it was only fair in the interest of truth, that the pictures that he took that the jury can see them.

"I might be wrong, if I am I'll accept Your Honor's opinion.

"The Court. You will accept my decision. You are not to criticize your brother counsel, with respect to matters which you are entitled to see in advance of trial for discovery and procurement of documents if they are relevant. If you neglected to do it you may not blame it upon opposing counsel as though it was their incompetence when it is your neglect.

"Mr. Greenberg. Well, your Honor—" (R. 20-21.)

(*b*) "Q. Mr. Logan, this is a photograph that was taken about two and a half hours after your accident: can you tell us which hatch cover it was that you stepped on?

"A. The second.

"Q. The second one there?

"Mr. Burns. Excuse me, what exhibit are you referring to?

"Mr. Greenberg. Exhibit 2-B. You haven't any copy. This is mine, which I am offering.

"The Court. Now, please. I really don't want to be in the unfortunate position of having every time to remind you of the appropriate comment. I shall not hesitate, really, to impose by voice and manner, correct standards upon you if you persistently and flagrantly violate what is well-accepted manner of behavior.

"Mr. Greenberg. Well, I'd like you to tell the jury, Your Honor, that no inference is to be drawn against my client because of anything— If I acted badly I don't think my client should suffer.

"The Court. Well, I quite agree that you are responsible and shall take the punishment yourself, and your client should not be rewarded or punished for your excellence or lack of it.

"Mr. Greenberg. Thank you." (R. 23.)

3. While Dr. Paul I. O'Brien was testifying, the Court spoke out as follows:

(*a*) "Mr. Zobel. Your Honor, if there is a report of those X-rays, may I see them?

"The Court. Mr. Greenberg, watch that kind of expression to the jury, which I can see, and which will not appear on the record. I now put it on the record. There is no reason at all for you to look that way with respect to counsel who prepare their cases diligently and thoroughly and in accordance with the rules.

"Mr. Greenberg. I apologize, Your Honor. I didn't intend to make any gesture or any facial expression.

I just wish to tell the jury once again that nothing should be held against my client.

"The Court. I hope that they understand it, otherwise there might be consequences which might not please you, Mr. Greenberg." (R. 28-29.)

(*b*) "XQ. Now, knowing that would you say that treatment had anything to do with that visit?

"A. I would say that he was coming to me at that time also to have a checkup.

"The Court. Wait a minute. The question is whether he came to you in response to a call from his lawyer in connection with an appointment just before the trial? Did he come to you for treatment, not having seen you for treatment for many months? Did he come to you for treatment?

"A. Well, I would say—

"The Court. Did he come to you for treatment?

"Mr. Greenberg. Your Honor, I object to the interrogation.

"The Court. You object to what?

"Mr. Greenberg. This man comes into Court very rarely.

"The Court. Mr. Greenberg, he is required to tell the truth, the whole truth and nothing but the truth. That is the only reason.

"Did he come to you for treatment?

"The Witness. No. I would say no.

"The Court. All right." (R. 29.)

4. Again, during Logan's testimony, the Court expressed itself as follows:

(*a*) "XQ. Well, you were treated by him then for your back pain, is that right?

"A. That is all; there was no loss of work.

"Mr. Hallisey. Your Honor, I ask that part go out, if Your Honor please.

"The Court. It certainly may. If you have to caution the witness again he may learn more about what my powers are.

"Mr. Greenberg. I object to that statement.

"The Court. Overruled.

"Mr. Greenberg. I would like to say something if I may.

"The Court. You will not say it now. You may, if you wish, at an appropriate time, but not in front of the jury.

"And I object to your method of trying this case, and I intend to make quite specific on the record why I object when the appropriate time comes.

"Mr. Greenberg. I'd like an opportunity to respond to your objection, Your Honor.

"The Court. The Court has the last word." (R. 33.)

(*b*) "XQ. The truth of the matter is, Mr. Logan, that you settled this case in July 1960 for seven-thousand, five-hundred dollars, isn't it?

"A. I didn't get that kind of money.

"Mr. Hallisey. I ask that go out, Your Honor.

"The Court. That may go out.

(Question read)

"Q. Have you a copy of that? Will you please answer the question?

"The Court. Do you very soon want to learn about the power of this Court?

"A. No.

"The Court. Then answer the question.

"Mr. Greenberg. I object to those remarks, Your Honor.

"The Court. I have had occasion to warn him several times, and now, I assure you, I intend to use the powers of the Court; not to just talk about them. Answer the question." (R. 33-34.)

(*c*) "XQ. And you answered them, didn't you?

"Mr. Greenberg. I object, Your Honor.

"The Court. Overruled.

"Mr. Greenberg. Can I be heard? This is an issue. The issue is that this man was in an accident on October 31, 1963 and he is bringing in something he signed in 1961; and we don't know what it is. He hasn't said what it is. He's asking a lot of questions having nothing to do with the issue before the jury. The issue is that this man: was this injury because of what happened on the ship; is the ship responsible? I don't think that is fair cross-examination, Your Honor.

"The Court. Mr. Greenberg, if you insist on making arguments in front of the jury, you will invite and get from the Court an explicit ruling. There is the gravest issue in this case as to whether anybody, specifically the plaintiff, is to blame for what happened. And there is the gravest questions as to whether or not the damages claimed by the plaintiff are appropriate.

"The issue as to his credibility is a fundamental issue. There are serious questions raised as to how truthful he is. On many occasions he has been under oath previously, and his prior statements under oath have led to a reasonable inquiry as to whether his credibility and veracity are such that anybody would believe him.

"The objection is overruled.

"Mr. Greenberg. Can I say something, Your Honor? There is no issue here as to how this accident happened. The man stepped on the head board and it went down, and there is no issue on credibility there.

"The Court. There is no doubt that the man was injured. There is the gravest doubt as to whether there is any liability of anyone with respect to it.

"Mr. Greenberg. Well, it's admitted by the defendant—

"The Court. The defendant doesn't admit liability.

"Mr. Greenberg. Well, they admit it in their answers to interrogatories. The hatch boards went down and he fell twenty feet.

"The Court. Mr. Greenberg, the issues before the Court and jury involve liability as well as damages, and there is the gravest question as to whether the plaintiff has borne the burden of proving that anyone, other than himself, is to blame.

"Mr. Greenberg. Well, Your Honor, I know Your Honor has been on the bench a long time; I know I have been before you a long time, but I state with all due respect to Your Honor, sometimes, and I'm saying this now—

"The Court. You'd better watch it now, I think you had better sit down.

"Mr. Greenberg. I think you should take into consideration—

"The Court. You'd better watch it—

"Mr. Greenberg. I think you should take into consideration—

"The Court. I'm going to take a recess for ten minutes. You are excused." (R. 34-36.)

The Circuit Court of Appeals rejected Logan's claim of bias and prejudice on the part of Judge Wyzanski. The

Circuit Court accused counsel for Logan of "highly objectionable" and "improper conduct." Reference was made to Logan's counsel's argument to the jury as follows:

> "If I might have done anything funny with respect to Judge Wyzanski that I shouldn't do, and if I have done anything here, I apologize. I apologize for whatever I have done. I am not perfect, members of the jury."[1] (App. 32.)

The Circuit Court interpreted this argument as a confession of improper conduct by counsel for Logan.

Logan concedes that a charge of unfair trial by the District Court is a serious charge. The right to a fair and impartial trial is implicit in the Fifth Amendment and relates to civil as well as criminal cases.

Counsel for Logan was aware of the tremendous influence that a judge, particularly Judge Wyzanski, has with the jury. Counsel was persuaded that at all times Judge Wyzanski was determined that Logan should not win this case. The only reason counsel referred to an apology in his argument was to attempt to offset any prejudice the jury might have against Logan and his counsel because of the difficulties they had experienced with the trial judge through the entire trial. The First Circuit has previously conceded in the case of *Crowe* v. *Di Manno,* 225 F. 2d 652 (1955), that a trial judge has a real influence on a jury. In finding the District Court judge guilty of prejudicial misconduct in favor of a plaintiff, the First Circuit wrote as follows:

> "The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his

[1] Respondent Empresa Lineas Maritimas Argentinas in its brief to the Circuit Court first quoted this section of argument by Logan's counsel as an admission of improper conduct.

lightest word or intimation is received with deference, and may prove controlling.' " (P. 655.)

The Circuit Court remains silent and does not render any opinion as to the charge of bias and prejudice by the District Court as it relates to Logan (App. 32). Logan was threatened with the "powers of the Court" (R. 29, 33). Dr. Philip Foisie, while sitting in the courtroom waiting to testify, had occasion to hear the questioning of Dr. Paul I. O'Brien by Judge Wyzanski as set forth in the record appendix on page 29 (R. 116). A few days later Dr. Foisie, in a speech before the American Trial Lawyer's Association at Boston, Massachusetts, March 19, 1965, "The Impact of Inquiry on the Body—The Surgeon's Viewpoint," spoke in part as follows:

> "I sat in court this week waiting to testify and heard the presiding Justice add his scorn to that of the cross-examination. In this instance, the physician on the stand was probably one of the most ethical and strictly honest doctors in the City of Boston. I am sure he was deeply hurt and that we won't be too anxious to go to court again, certainly not to that one."

Dr. Foisie does not mention either Dr. Paul O'Brien or Judge Wyzanski by name.

The Circuit Court in the last sentence of its opinion states: "The improprieties were counsel's, and these were compounded by the argument made in this court" (App. 33). Frankly, counsel does not understand this assertion of the Circuit Court. Unfortunately, the Circuit Court does not provide an official court reporter to take down the arguments of counsel. All counsel for Logan can say is that during the last fifteen years he has argued about fifteen cases before the First Circuit. He has never

before been criticized by that Court for "improprieties." Counsel argued the Logan case with respect for the Court of Appeals similar to any other previous case argued there.

Counsel for Logan, convinced that Logan had not received a fair trial and that he had been unfairly criticized by the Court of Appeals for representing his client to the best of his ability, appealed by letter to the Boston Bar Association, the Massachusetts Bar Association and the Massachusetts Trial Lawyer's Association to join Logan in his petition for certiorari to the Supreme Court as amicus. These three groups are the dominant lawyers' associations in this federal district.

In his letter to the Boston Bar Association and Massachusetts Bar Association, counsel concluded his letter in these words: "Surely, a Bar Association will come to the defense of a lawyer and his client if they are convinced their cause is just even though it means disagreeing with a decision of the Court."

The Boston Bar Association, after apologizing for the over three week delay in answering counsel's plea for assistance, wrote through its Executive Secretary that as a matter of policy the Association would not appear as amicus curiae.

The Massachusetts Bar Association never answered counsel's letter. The Massachusetts Trial Lawyer's Association gave counsel a hearing, sympathized with his plight; but stated it was too late to do anything.

The Supreme Court has the obligation and responsibility to see that the Federal Judiciary functions properly. The Supreme Court has an obligation to protect their lawyer-officers. The Federal judges are not members of a special sacred club that should be in an exalted position immune from criticism when their conduct is improper.

Logan submits that a reading of the entire transcript will establish that Judge Wyzanski was prejudiced and biased in favor of the vessel owner, Empresa Lineas Maritimas Argentinas. That, as a consequence, Logan did not receive a fair and impartial trial and was denied his constitutional right of a fair tribunal under the Fifth Amendment. Logan's only hope of justice is the Supreme Court.

This Court has in recent years accepted cases involving questions of civil rights, freedom of speech and the constitutional rights of defendants in criminal cases. Logan submits that the issues involved in his appeal are significant and of national importance, and also deserve the attention of this Court.

VI.

Conclusion.

For the foregoing reasons this petition for certiorari should be granted.

Respectfully submitted,

LAWRENCE F. O'DONNELL,
One State Street,
Boston, Massachusetts.

Of Counsel:
NATHAN GREENBERG, ESQ.,
One State Street,
Boston, Massachusetts.

[Appendix follows.]

Appendix.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WALTER LOGAN
v.
EMPRESA LINEAS MARITIMAS ARGENTINAS
v.
JARKA CORPORATION OF NEW ENGLAND

Civil Action
No. 63-1054-W

OPINION

April 5, 1965

WYZANSKI, D.J.

I have never known whether Mr. Greenberg is a poor lawyer or an excellent lawyer. See *Greenberg* v. *Panama Transport Company,* et al., District of Massachusetts Civil Action No. 59-617-W, 185 F. Supp. 320, vacated 290 F. 2d 125, cert. den. 368 U.S. 891. Is his special quality of excellence that he often appears to be poor? No doubt he regrets in this case that he did not accept the defendants' offer to pay his client Thirty Four Thousand Dollars ($34,000.00). But I, in the kindest way, warned him that if the verdicts went against him, I did not intend to set them aside. And I shall not.

An appeal may be promptly taken as I have arranged in advance of writing this Opinion to have the court reporter transcribe the full text of the record. Unfortunately there are excluded the unnecessary complimentary remarks which Mr. Greenberg made to me as a Judge which he asked to have left off the record.

All motions of all parties are denied.

s/ CHARLES E. WYZANSKI JR D.J.
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6536.

WALTER LOGAN,
PLAINTIFF, APPELLANT,
v.
EMPRESA LINEAS MARITIMAS ARGENTINAS
ET AL.,
APPELLEES;

No. 6546.

JARKA CORPORATION OF NEW ENGLAND,
THIRD-PARTY DEFENDANT, APPELLANT,
v.
EMPRESA LINEAS MARITIMAS ARGENTINAS,
THIRD-PARTY PLAINTIFF, APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge,* HAMLIN, *Senior Circuit Judge,** and MCENTEE, *Circuit Judge.*

Nathan Greenberg for Walter Logan.

Robert J. Hallisey and *Hiller B. Zobel,* with whom *Francis H. Fox* and *Thomas H. Walsh, Jr.,* were on brief, for Empresa Lineas Maritimas Argentinas.

Thomas D. Burns, with whom *Richard D. Sears, III,* was on brief, for Jarka Corporation of New England.

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*Sitting by designation.

OPINION OF THE COURT.

December 9, 1965.

HAMLIN, *Senior Circuit Judge.* Walter Logan, appellant herein, filed an action for damages in the Massachusetts Superior Court against Empresa Lineas Maritimas Argentinas, appellee herein. The action was removed to the United States District Court for the District of Massachusetts by appellee. In his complaint, appellant in two counts sought recovery based upon negligence and unseaworthiness for personal injuries sustained on or about October 31, 1963, while working as a longshoreman on the S.S. RIO BERMEJO, a vessel owned and operated by appellee. When appellee filed its answer denying negligence and unseaworthiness, it also brought in Logan's employer, Jarka Corporation of New England, as a third-party defendant. Prior to trial, appellant waived his negligence count and the case was tried before the district court and a jury on the unseaworthiness count.

The evidence disclosed that appellant was a longshoreman employed by Jarka and was a member of a gang discharging bales of wool from the S.S. RIO BERMEJO. During the discharging of this cargo, Logan fell through a hatch to the lower hold and sustained certain personal injuries.

The theory of Logan throughout the trial was that the hatch board which fell into the lower hold at the same time that Logan fell was short, and that by reason thereof the ship was unseaworthy.

Certain special questions were submitted by the district court to the jury and, based on the jury's answers to these questions, the court directed that a verdict be entered in favor of appellee on the principal action and a conditional judgment in favor of Jarka on the third-party action. Appellant has timely appealed to this court which has jurisdiction under 28 U.S.C. § 1291.

Appellant contends that the district court erred in the following particulars: (1) In denying appellant's request for certain instructions to the jury; (2) in failing to rule as a matter of law that appellee was liable for unseaworthiness; (3) in failing to inform appellee of its proposed action respecting his requests for instructions; (4) in requiring a witness employed by the Department of Labor to testify over the objection of that department; and (5) that he was denied a fair and impartial trial because of prejudice and hostility allegedly expressed by the district court against appellant and his counsel.

In submitting the special questions to the jury the court stated as follows:

> "A. Was the injury to the plaintiff Logan due to one or more of the following causes:
>
> 1. The hatch cover board was short of the proper length.
>
> 2. The hatch cover board was dislodged by being dragged out of place by the stevedoring operations.
>
> 3. The hatch cover fell for unexplained reasons.
>
> You will be asked to check figure 1, 2 or 3, or any combination of them. The second main question will be:
>
> B. What were the total damages suffered by the plaintiff Logan which were attributable to the fall he suffered on October 31, 1963. (Answer in dollars)
>
> C. Was the plaintiff Logan contributorily negligent. (Answer 'Yes' or 'No')
>
> D. If you answered 'Yes' on 'C', what proportion of the total causes of the accident is attributable to the contributory negligence of Plaintiff Logan. (Answer in percentage figures)"

The jury answered these questions as follows:

A-3. The hatch cover fell for unexplained reasons.

B. $60,000

C. No.

To Question "D" no answer had been given by the jury. After the jury had answered the above questions, the court called counsel for a discussion at the bench. The court stated that it was going to put a further question for the jury to answer. This question was as follows: "Was the hatch cover reasonably fit for its intended purpose, that is, was the ship 'seaworthy' as the court has defined that term? Answer 'Yes' or 'No.'" The court then stated that it would give counsel on either side a brief opportunity to argue further to the jury, after which the question was submitted to the jury and they again retired. After deliberation, the jury answered "Yes" to the last-above-stated question. Following this action the court stated that it would enter a verdict for the appellee and a conditional verdict for Jarka on the third-party action.

No witness testified to actually having seen the entire accident. Logan was seen falling through the air, but no witness saw what caused him to fall. Logan himself said that the board must have been short, although he did not himself see that it was short. A strong attack was made by appellee upon appellant's credibility by reason of certain contradictory statements that it was claimed appellant made about other accidents in which he had claimed and collected damages. Very shortly after the accident happened, a witness examined the hatch board in question and found that it was not short and that it fitted tightly into its proper place.

Appellant's first contention is that the court erred in failing to give to the jury the following instructions requested by him:

"3. If the jury finds the hatch board that the plaintiff stepped on dislodged and fell to the lower hold; the jury is warranted in finding the defendant liable for unseaworthiness."

"5. If the jury finds the hatch board was dislocated and/or not secure before the accident and the hatch board gave way when the plaintiff stepped on it; the jury is warranted in finding the defendant liable for unseaworthiness."

"1. Liability for an unseaworthy condition does not in any way depend upon negligence or fault or blame. That is to say, the shipowner is liable for all injuries and consequent damages proximately caused by an unseaworthy condition existing at any time, even though the owner or operator may have exercised due care under the circumstances, and may have had no notice or knowledge of the unseaworthy condition which proximately caused the injury or damage."

In reference to requested instructions Numbers 3 and 5, it is to be noted that the court in its charge did not ask the jury to make a finding of liability. They were asked to answer specific questions submitted to them. This not only was entirely proper, but the record also shows no objection by appellant to these questions. Inasmuch as instructions Numbers 3 and 5 contained the language "the jury is warranted in finding the defendant liable . . . . ," they were inappropriate under the circumstances, and there was no error in refusing to give them to the jury.

Similarly, the failure to give appellant's instruction Number 1 was not error. The fact that the issue of negligence was not in the case was pointed out by the court in its instructions, which were inter alia as follows:

". . . There is a suit by Mr. Logan, the injured longshoreman, against the Argentine Steamship Line,

which owns and operates the vessel on which he was injured the 31st of October, 1963, a year and a half ago.

• • •

"Let us begin with some matters which will not have to be resolved by you. There is no dispute that on this day, October 31st, 1963, Mr. Logan was a longshoreman who was an employee of the Jarka Company, and he is not suing his employer. You are not in the least bit concerned with what rights, if any, he has against his employer. That is not before you.

"There is no doubt that he quite lawfully was on the ship on which he was admittedly injured. He was there as an employee of the stevedoring company, the Jarka Corporation, which had a contract to unload the vessel, which was owned and operated by the steamship company. He had just as much right to be there as though he were a passenger on the vessel.

"There can be no doubt that he was injured on the vessel. No one disputes that he fell through the hatch and was very gravely injured. The mere fact that he was injured does not, by itself, entitle him to recover anything from the steamship company.

• • • •

"Likewise, the longshoreman, the stevedore, when he goes on a vessel has a right to have a seaworthy vessel.

• • •

"In order to recover for an injury which he sustains on the vessel, the longshoreman must show that the injury was caused by the unseaworthiness of the vessel.

"By agreement of counsel we are not dealing with any problem of negligence here. We are dealing with the broader problem of unseaworthiness.

"Now, laymen, when they think of a vessel being seaworthy or unseaworthy, probably ask themselves,

'Has this vessel a hole in the hold?' In other words, your natural lay attitude is, seaworthiness and unseaworthiness have something to do with whether the vessel or its operation is appropriate as you navigate the high seas.

"The word 'seaworthiness' as used in this branch of the law has a very much broader, more comprehensive scope. The duty which a shipowner/operator has is to provide a vessel which in all its parts, its equipment, its gear, and so forth, is reasonably fit and proper for the use for which that part of the vessel or its equipment is intended. . . .

"So, seaworthiness does not mean only is the ship ready to go on the high seas; it means is the ship so equipped in all its parts as to be reasonably fit and proper for the use of these parts."

Logan's contention that instruction Number 1 is a correct statement of the law does not help him. A judge is not required to instruct a jury in the exact language as suggested by a litigant. *Alexander* v. *Kramer Bros. Freight Lines, Inc.*, 273 F.2d 373 (2d Cir. 1959). The court's instructions as set out above properly defined seaworthiness and pointed out appellant's right to a seaworthy vessel. As long as the court's instructions properly covered the law involved, we see no error in his failing to give appellant's requested instruction Number 1.

Appellant's next contention is that the court erred in failing to rule as a matter of law that appellee was liable for unseaworthiness.

The mere happening of an accident does not in itself establish unseaworthiness. *Mosley* v. *Cia. Mar. Adra. S.A.*, 314 F.2d 223 (2d Cir.), *cert. denied*, 375 U.S. 829, 835 (1963); *Jefferson* v. *Taiyo Katun K.K.*, 310 F.2d 582 (5th Cir. 1962), *cert. denied*, 372 U.S. 967 (1963); *Nuzzo* v.

Rederi, 304 F.2d 506 (2d Cir. 1962); *Richter* v. *Mathiasen's Tanker Industries, Inc.*, 297 F.2d 494 (2d Cir. 1961), *cert. denied*, 369 U.S. 843 (1962).

The burden is on a plaintiff to establish unseaworthiness. In this case the appellant contended that the vessel was unseaworthy because the hatch board was short. However, there was testimony, as indicated above, that right after the accident the hatch board was examined, measured, and found not to be short but to fit tightly in place. Appellant did not introduce any evidence which would compel the conclusion that the accident could only have occurred through a defect in the hatch board. Under these circumstances, it was not error for the court to fail to direct a verdict in appellant's favor.

Appellant next contends that the district judge erred in failing to inform appellant of his proposed action respecting appellant's requests for instructions as required by Rule 51, Federal Rules of Civil Procedure. The record shows that after appellant had submitted his requested instructions to the court there was a conference between the court and counsel in the absence of the jury. In the course of this conference the following occurred:

> "Mr. Greenberg: Well I hope Your Honor will read my requests.
>
> "The Court: You do not think that I am going to read them to the jury?
>
> "Mr. Greenberg: I know you're not."

Certainly after these comments appellant is in no position to say that he did not know what action the court was going to take as to appellant's request for instructions. If appellant needed any further information he should have asked for it.

Appellant next claims that the court committed prejudicial error in requiring a witness, Edward Garvin, to

testify as to his personal observations on the vessel shortly after the accident in question. Garvin was subpoenaed by appellee.

Prior to his taking the witness stand there was a colloquy between counsel, Mr. Ross, an attorney for the Department of Labor, and the court, the pertinent portions of which are set out in the margin.[1] He testified that he

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[1] "Mr. Greenberg. Your Honor, there was a summons served on Mr. Garvin of the Department of Labor by my Brother. The attorney for the Department is here and he and Mr. Garvin are concerned about having Mr. Garvin testify. And he tells us that the Department tries to maintain a position of complete neutrality.

"The Court. There is nothing unneutral about telling the truth. You have to testify.

"Mr. Ross. If Your Honor please, I am an attorney for the Department of Labor, and I would like to state for the record our position in respect to this matter:

"Mr. Garvin is here in response to a summons served upon him. The regulations of the Department, which have been issued and in effect since 1915, which I know Your Honor is familiar with, 5 U.S.C. 29(a) Pt. 2, Sec. 2.11 reads:

> " 'In response to a subpoena duces tecum or ad testificandum no officer or employee of the Department shall give testimony or furnish to the court any documents which disclose confidential information.'
>
> "And further, 'If served with a subpoena, such officer or employee shall appear in court and respectfully refuse to testify or furnish such records and information, basing his refusal on the grounds that he is not the custodian of records and information.'

"The Court. Well, he is not being called in here to bring with him some document, Mr. Ross. Let's not go into that. That is not relevant.

"Mr. Ross. Your Honor, the situation is such that all the information obtained by this investigator was made by him during the course of his official investigation conducted as an agent or officer of the Department.

"The Court. It seems that the Government of the United States thinks everybody else is different. They could learn that in my court they are treated equally, and without any preference."

was a maritime safety officer with the United States Department of Labor, and that it was his duty to administer and enforce the safety code as to longshoring operations under Public Law 85742. He received a call that there had been an injury on board the RIO BERMEJO and he went down there to investigate. He then testified that he examined a hatch board that had been pointed out to him as the one which had fallen when appellant was injured. He testified that this hatch board was then fitted into place, that it was not short but that "it was very tight." He produced no records and referred to no information, facts or other matter that had been entrusted to him in confidence. We see no error in the action of the court in the admission of this testimony.[2]

Appellant's final contention is that the district court exhibited prejudice and hostility against him and his counsel to the extent that he was denied a fair and impartial trial. This is a serious charge and we have examined the record carefully to ascertain if it has any merit. The record shows that on several occasions the conduct of appellant's counsel was highly objectionable and that on some of these occasions the district court reprimanded him therefor. Apparently appellant's counsel realized that his conduct had been improper because he stated in his argument to the jury:

> "If I might have done anything funny with respect to Judge Wyzanski that I shouldn't do, and if I have done anything here, I apologize. I apologize for whatever I have done. I am not perfect, members of the jury."

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[2] In his brief appellant relies on *Universal Air Line, Inc.* v. *Eastern Air Lines, Inc.*, 188 F.2d 993 (D.C. Cir. 1951), and *Appeal of the United States Securities and Exchange Commission*, 226 F.2d 501 (6th Cir. 1955). An examination of these cases shows that they are inapposite.

A district judge is not required to remain silent while counsel engages in improper conduct before the jury. An examination of the record does not disclose any actions of the district judge that denied to appellant a fair and impartial trial. The improprieties were counsel's, and these were compounded by the argument made in this court.

Judgment of the district court in No.6536 is affirmed as is the judgment in No. 6546.